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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

EDWARD J. HOLLAND, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED FOR REVIEW

Should certiorari be granted because Federal Circuit Courts of Appeals have decided an important question of federal law which has not been, but should be settled and revisited in light of relevant decisions by the Supreme Court involving federal interest operating in the commercial lending field overriding local statute of limitation laws on money judgments when state law should apply by reason of *ex proprio vigore* or adoption by federal law?

PARTIES TO THE PROCEEDING

Petitioner, Edward J. Holland, Jr. was the Defendant in the United States District Court for the Eastern District of Michigan, Southern Division and Petitioner-Appellant in the United States Court of Appeals for the Sixth Circuit.

The United States of America was the Plaintiff in the United States District Court for the Eastern District of Michigan, Southern Division and Plaintiff-Appellee in the United States Court of Appeals for the Sixth Circuit.

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OPINIONS BELOW

On May 2, 1996, the United States Court of Appeals for the Sixth Circuit issued its Order (No. 93-2360) denying Petitioner's Petition for Rehearing en banc of the Sixth Circuit's Opinion decided and filed February 6, 1996, *United States of America v. Peoples Household Furnishings, Inc. Edward J. Holland, Jr.*, 75 F.3d 252 (6th Cir. 1996) affirming the decision of the District Court entered on July 23, 1993, Case No. 93-CV-71619-DT.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Sixth Circuit and its judgment of February 6, 1996. The judgment affirmed the lower court's judgment filed on July 14, 1993 and entered on July 23, 1996 that the government's lawsuit was not time-barred. Petitioner's Petition for Rehearing en banc was denied on May 2, 1996. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

M.C.L. 600.5809:

> Limits on actions to enforce noncontractual money obligations.
>
> Sec. 5809. (1) A person shall not bring or maintain an action to enforce noncontractual money obligations unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

(2) The period of limitations is 2 years for actions for the recovery of a penalty or forfeiture based on a penal statute brought in the name of the people of this state.

(3) Except as provided in subsection (4) the period of limitations is 10 years for actions founded upon judgments or decrees rendered in a court of record of this state, or in a court of record of the United States or of another state of the United States, from the time of the rendition of the judgment. The period of limitations is 6 years for actions founded upon judgments or decrees rendered in a court not of record of this state, or of another state, from the time of the rendition of the judgment. A judgment entered in the District Court of this state before May 25, 1973, is a judgment of a court not of record. A judgment entered in the District Court of this state on or after May 25, 1973, except a judgment entered in the small claims division of the District Court, is a judgment of a court of record. Within these periods an action may be brought upon the judgment for a new judgment which, in its turn, will be subject to this subsection.

Editor's note:

Subsection (3) commences with the phrase "Except as provided in subsection (4)." The second sentence of subsection (3) may have been intended to have been numbered as subsection (4). Committee NoteSource.

M.C.L. 600.6101:

Duration of proceedings.

Sec. 6101. A proceeding under this chapter may be maintained until the judgment is satisfied, vacated, or barred by the Statute of Limitations.

STATEMENT OF THE CASE

This case originated in the first instance ~~in the~~ United States District Court in an action comenced on April 19, 1993, Case No. 93-CV-71619-DT by the United States against Edward J. Holland, Jr. with jurisdiction established by 28 U.S.C. § 1345.

The action by the United States was initiated on a judgment entered February 9, 1978 regarding an unpaid balance of $435,486.99 exclusive of costs and accrued interest which amounted to $884,194.38 inclusive of principal, costs and accrued interest.

The court granted summary judgment to the United States on July 14, 1993 over Defendant Edward J. Holland, Jr.'s Motion to Dismiss filed on May 11, 1993 contending that the action of the United States was time-barred by the applicable Michigan statute of limitations, M.C.L. 600.5809(3) in that the judgment had not been renewed by the United States within ten (10) years as provided for by M.C.L. 600.5809(3).

On appeal to the Court of Appeals, Defendant raised the following issues:

1. Appellee is clearly bound by the Michigan statute of limitations and the doctrine of laches where the

express language within the financing agreement states that the parties thereto will be bound by Michigan laws and where Appellee, as an assignee, is subject to the rights and duties of the assignor.

2. The lower court erred in renewing Appellee's dormant judgment where said judgment was both time-barred pursuant to M.C.L. 600.5809(3), M.S.A. 27A.5809 and contrary to public policy and was therefore incapable of enforcement.

3. The lower court erred in granting Appellee's motion for summary judgment where there are clearly numerous genuine issues of fact herein.

On February 6, 1996 the Court of Appeals for the Sixth Circuit affirmed the District Court.

Petitioner filed a Petition for Rehearing with Suggestion for Rehearing en banc which was denied by the Court of Appeals on May 2, 1996.

The Court of Appeals held that the government was acting in a governmental capacity and, therefore, is not bound by the state statute of limitations, the Court of Appeals based its ruling in substantial part on *United States v. Summerlin*, 310 U.S. 414, 84 L. Ed. 1283, 60 S. Ct. 1019 (1940).

The Court of Appeals stated, however, that:

> Reconsideration of *Summerlin* might likewise make sense, we think, with respect to the revival of dormant Judgments obtained by the United States under what *Muirhead* [*Farmers Home Admin. v. Muirhead*, 42 F.3d

> 964 [5th Cir.], *cert. denied,* 133 L. Ed. 2d 16, 116 S. Ct. 50 (1995)] refers to as the government's "numerous, long-lived and often default-prone Federal lending programs . . ." *Id.* at 967. Is it really justifiable, in today's world, that judgments obtained on loans made or guaranteed under these programs should be subject to resuscitation 15 or 30 or 60 years after entry, regardless of state law to the contrary? Probably not.

This Petition follows.

REASON FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FEDERAL CIRCUIT COURTS OF APPEALS HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED AND REVISITED IN LIGHT OF RELEVANT DECISIONS BY THE SUPREME COURT INVOLVING FEDERAL INTEREST OPERATING IN THE COMMERCIAL LENDING FIELD OVERRIDING LOCAL STATUTE OF LIMITATION LAWS ON MONEY JUDGMENTS WHEN STATE LAW SHOULD APPLY BY REASON OF *EX PROPRIO VIGORE* OR ADOPTION BY FEDERAL LAW.

"We doubt that the foundation of the republic would crumble if the government were now to be held to the same timetables as everyone else in suing to renew its money Judgments." *United States of America v. Edward J. Holland, Jr.,* 75 F.3d 252, U.S. App. Lexis 1541, Fed. App. 0041P (6th Cir. 1996).

In *United States* v. *Summerlin*, 310 U.S. 414, 60 S. Ct. 1019, 84 L. Ed. 1283 (1940) the Court held that "when the United States becomes entitled to a claim in its governmental capacity and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement."

In the instant case Petitioner had guaranteed a loan made by a bank to Peoples Household Furnishings, Inc., which was also guaranteed to the bank by the Small Business Administration (SBA). In February of 1978 the government obtained a judgment against Petitioner, Mr. Holland, on his guaranty.

The judgment eventually became dormant. Michigan law M.C.L. 600.5809(3) requires that actions found upon a judgment shall be renewed within ten years from date of entry. The government filed an action upon the judgment more than 15 years after the judgment was entered. The government citing *Summerlin* asserted that it is not bound by local statutes of limitations. The government prevailed on its position at the District Court and was upheld by the Court of Appeals for the Sixth Circuit.

Petitioner Holland contends as stated in dictum in *Farmers Home Admin. v. Muirhead*, 42 F.3d 964 (5th Cir. 1995) that "contrary to the commercial realism prominent" in today's environment

> . . . the ancient attribute of sovereignty asserted by the federal government is far more appropriate to essential sovereign functions than to the government's role as a lender to veterans, small business owners, farmers, and disaster victims. That the attribute is ancient does not make it sensibly

> applicable to the government's role in commercial transactions.
>
> In short, *Summerlin* and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's . . . actions arising from federal loan programs.

Id. at 967-68.

Further, as noted by the Court of Appeals for the Sixth Circuit in the case at bar, "reconsideration of *Summerlin* might likewise make sense. . . . Is it really justifiable, in today's world, that Judgments obtained on loans made or guaranteed under these programs should be subject to resuscitation 15 or 30 or 60 years after entry, regardless of state law to the contrary? Probably not."

Petitioner believes that the troubling concerns raised by the federal Circuit Courts of Appeals in connection with important questions of federal law decided by the Circuits regarding, federal interest overriding local state law in the area of state statutes of limitations, should be revisited and settled by the Supreme Court in light of the Supreme Court's three part test for determining whether state law can be incorporated as the federal rule. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). *Accord Farmers Home Administration v. Muirhead*, 42 F.3d 964, U.S. App. Lexis 1298 (1995). The court set forth the following three part test for incorporating state law as the federal rule:

> 1. When there is little need for a nationally uniform body of law and;

2. Whether application of state law would frustrate specific objectives of Federal programs and;

3. The extent to which application of a Federal rule would disrupt commercial relationships predicated on state law.

It is patently clear that the court's analysis of the SBA's lending program has demonstrated no overriding federal interest in disregarding and supplanting local state law with a uniform federal rule, but rather the court incorporated state law as the federal rule in connection with the local state laws at issue therein. *United States v. Yazell*, 382 U.S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966). *Accord Kimbell* and *Muirhead.*

The *Yazell* and *Kimbell* Courts found:

1. "That the United States, as Soverign, has certain preferences and priorities, but neither Congress nor this Court has ever asserted that they are absolute." *Yazell*, at 348.

2. This Court's decisions applying "federal law" to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the nation. *Id* .at 353.

3. Whether state law . . ."should apply *ex proprio vigore* — on the theory that the contract here was made pursuant and subject to . . . state law or by [adoption] as a federal principle, it is clear that state rule should govern. There is no need for uniformity. There is no problem in complying with state law; in fact, SBA transactions in each state are specifically and in great detail adopted to state law." *Id.* at 356, 357.

4. SBA offices should comply with state law, in particular, with state procedural requirements for obtaining enforceable security interest. ". . . that the SBA conforms its transactions to state law is also reflected in the security agreement . . . approved by the SBA which provided that the contract would be construed according to Texas law and bound the parties' assigns to this provision." *Kimbell* at 731.

Similarly, in the case at bar the loan transaction was individually and painfully negotiated in particular detail to local state laws. The transaction was governed by local Michigan state law and the Michigan Uniform Commercial Code. This loan documentation contractually bound the government to state law through assignment of the Bank's interest to the government.

In *Kimbell*, the Court noted "as Judge Friendly observed in *United States v. Wagematic Corp.*, 360 F.2d 674, 676 (2nd Cir. 1966): when the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States." *Id.* at 732.

As the Court of Appeals for the Sixth Circuit has noted,

> . . . the ancient rule *quod nullum tempus accurit regi* that the sovereign is exempt from the consequences of its laches and from the operation of statutes of limitation . . . because the government can transact its business only through its agents; and its fiscal operations are so various, and its agencies too numerous and scattered, that the utmost vigilance

> would not save the public from the most serious losses, if the Doctrine of Laches can be applied to its transactions.

Holland at 254.

As we approach the 21st century, Petitioner contends that the Court of Appeals correctly analyzed-the ancient rule *quod nullum tempus accurit regi* in the context of modern technology and stated that:

> In the age of computer networks, however this is no longer the case. Today, surely, the staff of the United States Attorney, or the people in the Civil Division . . . could readily alert themselves electronically to any and all of the government's uncollected judgments that are getting close to a specified age. . . .

Id. at 256.

Petitioner Holland in summary contends as the Supreme Court articulated in *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 114 S. Ct. 2048, U.S. Lexis 4446, 129 L. Ed. 61, 62 (1994), that "what is fatal" to the government's "position in the present case is that it has identified no significant conflict with identifiable federal policy or interest. There is not even at stake that most generic (and lightly envoked) of alleged federal interest, the interest of uniformity."

Petitioner maintains that a government policy in the commercial field which ignores neglect of government agents, as in the instant case, promotes complacency in government because under *Summerlin*'s application no consequences to the government will avail.

Further, Petitioner believes in the foundational principle echoed in the opinion of Justice Oliver Wendell Holmes that "the United States does business on business terms", *United States v. National Exchange Bank*, 270 U.S. 527, 534 (1926), and therefore the Petitioner should expect that when the government voluntarily enters into a private commercial contract by way of assignment, as in the instant case, the government should be bound to the business terms of such a private commercial contract and "be held to the same timetables as everyone else in suing to renew its money judgments." *Holland* at 256.

Thus, unless this Honorable Court is inclined to find that Respondent Government, simply because it is the Government, is entitled to collect on a judgment from its debtors, notwithstanding its own lack of due diligence and excessive tardiness in executing said judgment, there is no good reason for departing from state law in this case. *United States v. Willis*, 593 F.2d 247, 14 Ohio Op. 3d 443 (1979).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER STAYING MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 6, 1996

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No: 93-2360

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

PEOPLES HOUSEHOLD FURNISHINGS, INCORPORATED;

Defendant

EDWARD J. HOLLAND, JR.

Defendant - Appellant

ORDER

BEFORE: NELSON and RYAN; Circuit JUDGES; ECHOLS, District Judge.*

Upon consideration of the motion filed by the appellant to further stay the mandate pending the filing of a Petition for Writ of Certiorari,

---

* The Honorable Robert L. Echols, United States District Judge for the Middle District of Tennessee, sitting by designation.

Appendix A

It is ORDERED that the motion be, and it hereby is, **GRANTED**. The mandate is stayed until August 3, 1996 unless the Court is advised that the Petition for Writ of Certiorari has been filed.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — ORDER STAYING MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 2, 1996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 93-2360

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

PEOPLES HOUSEHOLD FURNISHINGS, INCORPORATED;

Defendant

EDWARD J. HOLLAND, JR.

Defendant - Appellant

ORDER

BEFORE: NELSON, AND RYAN; Circuit Judges; and ECHOLS, District Judge.*

Upon sua sonte consideration,

It is ORDERED that the mandate be, and it hereby is,

---

* Hon. Robert L. Echols, United States District Judge for the Middle District of Tennessee, sitting by designation.

Appendix B

STAYED for thirty days from this Order, pursuant to rule 41(b), Fed.R.App.P., pending the filing of a Petition for Writ of Certiorari.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX C — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 2, 1996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-2360

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD J. HOLLAND, JR., ET AL.,

Defendant-Appellant.

ORDER

BEFORE: NELSON and RYAN, Circuit Judges; and ECHOLS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing

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* Hon. Robert L. Echols, United States District Judge for the Middle District of Tennessee, sitting by designation.

Appendix C

and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED FEBRUARY 6, 1996

No. 93-2360

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PEOPLES HOUSEHOLD FURNISHINGS, INC.,

Defendant,

EDWARD J. HOLLAND, JR.,

Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed February 6, 1996

Before: NELSON and RYAN, Circuit Judges; ECHOLS, District Judge.*

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* The Honorable Robert L. Echols, United States District Judge for the Middle District of Tennessee, sitting by designation.

Appendix D

NELSON, J., writing for the court, delivered an opinion in which ECHOLS, D.J., concurred. RYAN, J., concurred in all but Part III of the opinion.

DAVID A. NELSON, Circuit Judge. Michigan law establishes a ten-year limitations period for actions founded upon judgments. See Mich. Comp. Laws 600.5809(3). In the case at bar the United States, which in 1978 obtained a money judgment against defendant Edward Holland in the United States District Court for the Eastern District of Michigan, brought suit on the judgment in the same court 15 years later. Relying on *United States v. Summerlin*, 310 U.S. 414 (1940), where the Supreme Court held that the United States is not bound by state statutes of limitation insofar as claims acquired and asserted in a governmental capacity are concerned, the district court rejected a statute of limitations defense and granted judgment to the United States for the unpaid balance of the original judgment plus interest.

The claim on which the original judgment was based rested on an undertaking given by Mr. Holland in connection with a federal loan guaranty program administered by the Small Business Administration. On the facts presented, we conclude that the United States was acting in its governmental or sovereign capacity in acquiring the claim, reducing it to judgment, and later bringing suit on the judgment. We agree with the district court that the government's lawsuit was not time-barred, and we shall affirm the judgment appealed from.

I

Under a loan guaranty program designed to promote the training and hiring of members of racial minorities, as we are told

in defendant Holland's brief, a minority-owned company called Peoples Household Furnishing, Inc., borrowed $350,000 from the Bank of the Commonwealth in 1970. The Small Business Administration — a government agency established by §204 of the Small Business Act of 1953, 67 Stat. 233 (codified in 1958 at 15 U.S.C. §633) — guaranteed 90 percent of the loan. The loan was also guaranteed by Mr. Holland.[1]

The loan was memorialized in a promissory note that apparently was subject to the terms of a financing agreement entered into between Peoples and the bank. The financing agreement, we are told, recited that it was governed by the laws of the State of Michigan. (The pertinent documents were not included in the record of the present case, and motions to expand the record were denied by the district court and by a panel of this court.)

The note went into default, and in 1971, pursuant to prior agreement, the bank assigned the note to the SBA. Accelerating the maturity of the note, SBA made demand upon Peoples and

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1. An unpublished opinion filed by this court in 1981 notes that Mr. Holland was the president of Peoples; that Peoples evolved from the remnants of a Detroit-area retailer that had been forced into reorganization under Chapter XI of the Bankruptcy Act; that Peoples' loan application "met *none* of the [SBA] guidelines for loan approval;" that an SBA staff recommendation for disapproval of the loan was nonetheless rejected by the SBA's District Director, "who felt that the social welfare advantages of the proposal, in providing 'a sympathetic training environment for persons in minority groups,' outweighed the adverse factors which normally would justify rejection of such a loan;" and that the District Director, contrary to the strong recommendation of the bankruptcy judge, conditioned his approval on Mr. Holland's guaranteeing the loan personally. *United States v. Peoples Household Furnishings, Inc., et al.*, Nos. 78-1368 and 79-1485 (6th Cir., Oct. 21, 1981), at pp. 1-2.

Mr. Holland for payment in full. The demand was not honored, so the assets of the corporation were liquidated at a public sale and credited against the balance due.

In December of 1973 the government brought a federal court suit against Peoples and Mr. Holland for the deficiency. Peoples received a discharge in bankruptcy before the case went to judgment, but in February of 1978 the district court entered judgment against Mr. Holland on his guaranty. The judgment, which included accrued interest, was for $435,486.99 plus costs of $125.26 and interest of six percent per annum from January 18, 1978. This court affirmed the judgment on appeal. (See the citation in n. 1, *supra.*)

The government represents that entry of the judgment was followed by years of unsuccessful collection efforts. Mr. Holland represents that the government simply sat on its judgment, allowing interest to accrue. Whatever the facts may be in this regard, both sides agree that the judgment eventually became dormant.[2]

In April of 1993 the government filed a complaint in federal district court alleging that there was an unpaid balance of $884,174.38 on the 1978 judgment. The complaint prayed for judgment in that amount, plus interest and a 10 percent surcharge under 28 U.S.C. §3011. Mr. Holland moved for dismissal under Mich. Comp. Laws §600.5809(3), which provides in pertinent part that "the period of limitations is 10 years for actions founded

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2. Under Rule 69(a), Fed. R. Civ. P., the procedure on execution of a federal judgment follows state practice and procedure except to the extent that a federal statute provides otherwise. In telling us that the 1978 judgment became "dormant," the parties presumably mean that it reached an age at which it could not be enforced under Michigan law.

upon judgments or decrees rendered in a court of record of this state, or in a court of record of the United States. . . from the time of the rendition of the judgment."

In July of 1993 the district court denied the motion to dismiss and granted summary judgment to the government.[3] Mr. Holland moved for reconsideration, asserting a defense of laches in addition to his statute of limitations defense. The district court denied the motion for reconsideration, and this appeal followed.

II

The ancient rule *quod nullum tempus occurit regi* — "that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations" — has enjoyed continuing vitality for centuries. *Guaranty Trust Co. of New York v. United States,* 304 U.S. 126, 132 (1938). Citing Blackstone, Mr. Justice Story noted nearly 175 years ago that the reason for the rule was sometimes asserted to be that "the king is always busied for the public good, and, therefore, has not leisure to assert his right within the time limited to subjects." *United States v. Hoar,* 26 F.Cas. 329, 330 (Cir. Crt., D. Mass. 1821). This rather quaint rationale did not strike Story as persuasive: "The true

---

3. The judgment was for "the sum of $884,174.38 plus interest at the rate of six percent per annum from the date of default to the date of judgment; costs; penalty charges; ten percent surcharge per 28 U.S.C. §3011(a); and interest from date of judgment at the legal rate in effect on such date." According to the government's complaint the $884,174.38 figure included interest to April 15, 1993. We are at a loss to understand why the government should be entitled to additional interest on that figure "from the date of default," and we have questions about the penalty charges and ten percent surcharge as well. Mr. Holland has raised no issue about these matters, but we do not intend to preclude him from doing so in the district court.

reason," he said, ". . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *Id.* Accord, *United States v. Weintraub,* 613 F.2d 612, 618 (6th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980). See also *United States v. Kirkpatrick,* 22 U.S. 720, 735 (1824) (Story, J.) ("The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions").

In *Custer v. McCutcheon,* 283 U.S. 514 (1931), the Supreme Court held that where a state statute authorized the issuance of writs of execution within five years after the entry of judgment, the United States could not levy execution in that state on a judgment entered in favor of the United States more than five years before the levy. But noting that "[t]he time limited for issuing executions is, strictly speaking, not a statute of limitations," the Court was at pains to point out that the government "is not precluded from bringing an action upon the judgment. . . ." *Id.* at 532.

United States v. Summerlin, 310 U.S. 414 (1940), on which the district court relied in the case at bar, did not involve an action upon a judgment. In other respects, however, the facts of that case were similar to those in the case at bar. The defendant in *Summerlin* was the administratrix of the estate of one J. F. Andrew. Mr. Andrew had executed a promissory note under the National Housing Act, 48 Stat. 1246, and following a default the note had been assigned to the Federal Housing Administrator. After Mr. Andrew's death the administratrix gave notice by publication that creditors of the estate had eight months, as

provided by state statute, to file proof of their claims. The FHA filed its claim 11 months later, and the state supreme court — treating the statute as "a statute of non claims" rather than a statute of limitations — held the claim void. *United States v. Summerlin*, 140 Fla. 475, 477, 191 So. 842, 843 (1939). The Supreme Court of the United States reversed this judgment.

Chief Justice Hughes, speaking for a unanimous court in *Summerlin*, declared it to be "well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." 310 U.S. at 416. Insofar as the state statute purported to invalidate the claim of the United States, the statute "transgressed the limits of state power." *Id.* at 417. This was so because, in the words of the Court,

> "When the United States becomes entitled to a claim, acting in its governmental capacity and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." *Id.*

And because the claim had been acquired by the FHA on behalf of the United States through operations under the National Housing Act, the Court implicitly held, the United States was asserting the claim "in its governmental capacity."

The Supreme Court distinguished *Summerlin*, but did not question its continued validity, in *United States v. California*, 113 S.Ct. 1784 (1993). There the United States had retained a private contractor to manage oil drilling operations on government land. The contractor was to be compensated through

reimbursement of its costs plus a fixed fee. The State of California assessed sales and use taxes against the contractor on property purchased by it, and the taxes were paid under protest with funds advanced by the federal government. After the state statute of limitations on tax refund suits had run, the United States filed a declaratory judgment action seeking to establish that the taxed property was exempt under California law. Rejecting a contention that the United States had a federal quasi-contract claim that was not subject to the statute of limitations for tax refunds, the Supreme Court held the declaratory judgment action time-barred under state law. The government was in no better position than it would be in as a subrogee of the contractor, the Court reasoned, and the government acquired no special rights by stepping into the shoes of one whose rights had lapsed. 113 S.Ct. at 1788-90.

In response to an argument based on *Summerlin* to the effect that the United States is not bound by state statutes of limitation, the Court pointed out that the claim on which the government sued in *Summerlin* had been received by assignment pursuant to a federal statute, the National Housing Act. *California,* 113 S.Ct. at 1791. "[T]he Government was proceeding in its sovereign capacity" in *Summerlin,* moreover, whereas in *California* the government "became entitled to its claim by indemnifying a private contractor's state-law debt." *Id.* The clear implication is that in so indemnifying its contractor, the government was acting in its individual or proprietary capacity, as opposed to its sovereign capacity.

Was the United States also acting in a proprietary capacity in the case at bar? We think not. Here, as in *Summerlin*, it was pursuant to a federal statute that the government became the assignee of the note on which it brought suit. The statute in

question was designed to enhance the security and economic well-being of the nation, see 15 U.S.C. §631, and its purposes are surely no less "governmental" in character than those of the National Housing Act.

The decision of the SBA's district director to approve the Peoples loan in the first place seems to have been based entirely on the "social welfare advantages" of the loan. See n. 1, *supra*. It may be clear in the light of hindsight that the director was doing defendant Holland no service in approving the loan, just as he was doing the taxpayers no service, but the director's motivation at the time had a quintessentially governmental cast to it. The approval of the loan, like the taking of the assignment when the loan went sour, was unquestionably governmental, in our view, and not proprietary.

The United States likewise acted in a governmental capacity when it reduced its claim to judgment, and when, having failed to collect, it brought suit on the judgment. The Small Business Act authorizes pursuit, "to final collection," of "all claims against third parties assigned to the Administrator in connection with loans made [and, presumably, guaranteed] by him." 15 U.S.C. §634(b)(4). The suit on the judgment against defendant Holland was no less a step toward "final collection" than the original suit was. See *United States v. Kellum*, 523 F.2d 1284 (5th Cir. 1975), where a state statute of limitations was held inapplicable to an action brought to renew a dormant judgment for the unpaid balance of an SBA loan.

Our conclusion that the United States was acting in a governmental or sovereign capacity here, as those terms are used in *Summerlin* and *California*, finds support in the recent case of *Farmers Home Admin. v. Muirhead*, 42 F.3d 964 (5th Cir.), *cert.*

denied, 116 S.Ct. 50 (1995). There the Court of Appeals for the Fifth Circuit held that mortgage foreclosure proceedings instituted to collect balances due on notes held by the Farmers Home Administration, a federal agency, were not subject to a state statute of limitation. Just as in *Summerlin*, the proceedings in *Muirhead* "arose from a federal loan program and [the agency] was proceeding 'as the sovereign'. . . ." *Id.* at 965-66, n.4.

III

Although the *Muirhead* court accepted the proposition that state statutes of limitation may not run against the sovereign, the court observed by way of dictum that this proposition "seems quite inappropriate in the context of federal loan programs." *Id.* at 967. In some situations, as the court pointed out, the Supreme Court has adopted state law as the appropriate federal rule where nationwide uniformity is not necessary, adoption of state law would not frustrate specific federal objections, and imposition of a federal common law rule — which is what the *nullum tempus* rule is — would disrupt commercial relationships based on state law. *Id.*, discussing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), *United States v. Yazell,* 382 U.S. 341 (1966), and *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 114 S.Ct. 2048 (1994). The Fifth Circuit then went on to express itself as follows:

> "Contrary to the commercial realism prominent in all of these cases, the ancient attribute of sovereignty asserted by the federal government is far more appropriate to essential sovereign functions than to the federal government's role as a lender to veterans, small business owners, farmers,

> and disaster victims among others. That the attribute is ancient does not make it sensibly applicable to the government's role in commercial transactions.
>
> * * *
>
> In short, *Summerlin* and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's real property foreclosure actions arising from federal loan programs." *Muirhead,* 42 F.3d at 967-68.

Reconsideration of *Summerlin* might likewise make sense, we think, with respect to the revival of dormant judgments obtained by the United States under what *Muirhead* refers to as the government's "numerous, long-lived and often default-prone federal lending programs. . . ." *Id.* at 967. Is it really justifiable, in today's world, that judgments obtained on loans made or guaranteed under these programs should be subject to resuscitation 15 or 30 or 60 years after entry, regardless of state law to the contrary? Probably not.

When Mr. Justice Story spoke in *Kirkpatrick,* 22 U.S. at 734, of the government's agents being "scattered," he had in mind that their geographic isolation made it difficult for their superiors, even with "the utmost vigilance," to keep track of what the agents were or were not doing. In the age of computer networks, however, this is no longer the case. Today, surely, the staff of the United States Attorney, or the people in the Civil Division of the Department of Justice in Washington, could readily alert themselves electronically to any and all of the government's

uncollected judgments that are getting close to a specified age. We doubt that the foundations of the republic would crumble if the government were now to be held to the same timetables as everyone else in suing to renew its money judgments.

IV

It is not for this court to revisit *Summerlin*, however. The judgment of the district court is therefore **AFFIRMED**.

APPENDIX E — PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED APRIL 5, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

District Ct. No.: 93-71619
Ct. of Appeals No.: 93-2360

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

PEOPLES HOUSEHOLD FURNISHINGS, INC. a Michigan Corporation, and Edward J. Holland, Jr., jointly and severally

Petitioner-Appellant.

TUCKER & HUGHES, P.C.
Attorney for Petitioner-Appellant
CLARENCE B. TUCKER (P-40703)
615 Griswold, Suite 920
Detroit, MI 48226
(313) 961-5270

PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgement, that the panel decision is contrary to the following decision of the Sixth Circuit Court of Appeals and that

a consideration by the full court is necessary to secure and maintain uniformity of decisions; See:

1. *U.S. v Republic Insurance Co.*, 775 F.2d 156 (1985).

I express a belief, based on a reasoned and studied professional judgement, that this appeal includes one or more questions of exceptional importance:

1. Whether the government acting through the U.S. Small Business Administration (SBA) in the commercial field can be bound by state statutes of limitations in connection with an individualized, negotiated commercial note which was received by the SBA through an assignment from a local bank and to which the government was not a party, when such state statute of limitation was a condition of the contract.

* * *

STATEMENT OF APPELLATE JURISDICTION

This court has jurisdiction pursuant to Fed. R. App. P. 35 and 40.

STATEMENT OF ISSUE PRESENTED FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Whether the government acting through the U.S. Small Business Administration (SBA) in the commercial field can be bound by state statutes of limitations in connection with an individualized, negotiated commercial note which was received by the SBA through an assignment from a local bank and to which

the government was not a party, when such state statute of limitation was a condition of the contract.

ARGUMENT

Whether the government acting through the U.S. Small Business Administration (SBA) in the commercial field can be bound by state statutes of limitations in connection with an individualized, negotiated commercial note which was received by the SBA through an assignment from a local bank and to which the government was not a party, when such state statute of limitation was a condition of the contract.

"We doubt that the foundations of the republic would crumble if the government were now to be held to the same timetables as everyone else in suing to renew its money judgements". Fed. App. 0041P at page 10 (1996) quoting from the opinion delivered by Circuit Judge David A. Nelson.

The position articulated by Judge Nelson supra, in the instant case is in accord with the foundational reasoning of congress when it "passed Public Law 89-505 codified at 28 U.S.C. § 2415 the statute of limitations on contract and tort actions brought by the United States. In recommending passage of the law, the reports of the House and Senate Judiciary Committees stated":

> . . . . . The government litigation covered by the bill arises out of activity which is very similar to commercial activity. Many of the

> contract and tort claims asserted by the government are almost indistinguishable from claims made by private individuals against the government. Therefore, it is only right that the law should provide a period of time within which the government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity,. . .
>
> . . . The emphasis on fairness . . . is a very important consideration and the principal basis for the bill . . . the government will be barred from asserting old and stale claims in the courts and the necessity for the early assertion of claims will require increased efficiency in government proceedings. *See SER Jobs for Progress, Inc., v United States,* 759 Fed 1 (1985).

This expanding fundamental policy of fairness in government contracting and of assessing the threat to Federal interest in relation to state Statutes of limitations and the concept of laches as applied to the government, particularly when the government has voluntarily elected to do business in the commercial field is expressed in this courts holding in *United States of America v Republic Insurance Company,* 775 F2d 156 (6th cir. 1985) which we contend is in conflict with the holding in the instant matter.

In *Republic,* supra the issue defined before the, court was

"whether the government, after acquiring a contractual claim through subrogation, can enforce rights under the contract, while at the same time, avoid conditions imposed by the same writing". Id at 158.

The government argues in Republic, supra, that when the United States obtains a claim by subrogation, that claim cannot be barred by a period of limitation of action created by a contract to which it was not a party. Among the cases cited by the government was

> *United States v Summerlin,* 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283 (1940).

The Republic Court in holding that state law applies found that there is no significant threat to federal interests posed by the interpretation of insurance contracts between private parties pursuant to state law, citing *Indemnity Insurance Co. v United States,* 757 F2d 982, 985 (9th cir. 1985), as follows:

> "Absent a significant threat to federal interests, and in view of the federal as well as state interests in preserving the integrity of contracts, we see no reason to fashion a federal rule and, instead turn to state law," see *Republic*, supra, at 159.

This court's reasoning in Republic, supra, was in complete harmony with the Supreme Court's reasoning in *United States v Kimbell Foods,* 440 U.S. 715, 729; 99 S.Ct. 1448, 1459; 59 L.Ed. 2d 711 (1979) and *United States v Yazell,* 382 U.S. 341; 86 S.Ct. 500; 15 L.Ed 2d 404 (1966) where those courts found that:

because SBA operations were specifically and in great detail adapted to state law, the federal interest in supplanting important and carefully evolved state arrangements designed to serve multiple purposes was minimal. Yazell, Id at 353". Our conclusion that compliance with state law would produce no hardship on the agency was also based on the SBA's practice of "individually [negotiating] in painfully particularized detail" each loan transaction, Yazell Id at 345-346.

The applicable regulations recognize that in order to implement and facilitate the federal loan programs, SBA offices should comply with state law, in particular, with state procedural requirements for obtaining enforceable interest. 13 CFR @ 101.1 (d)(3) (1978). And the SBA routinely follows such rules, Tr. of Oral Arg. in No. 77-1359, p. 43, as it did here by requiring Republic to file a financing statement and a notice of assignment. That the SBA conforms its transactions to state law is also reflected in the security agreement between Republic and O.K. Super Markets, approved by the SBA, which provided that the contract would be construed according to Texas law and bound the parties' assigns to this provision. App. in No. 77-1359, p. 68.

Appendix E

The instant case presents a contract made in the commercial field between private parties. The contract was made in Michigan and specified that the laws of the State of Michigan and the uniform commercial code government the commercial transaction.

The fact that the government in *Republic, Kimbell* and *Yazell,* supra, was acting in their governmental capacity presented no insurmountable impediment, *Summerlin,* supra, not withstanding, to the decisions in those cases concluding that given the extensive involvement of the government in the commercial field and the lack of any overbearing threat to federal interest, local state law was adapted.

Likewise, we ask the court to reconsider in the instant matter the reasoning of this court in Republic, supra and find that Michigan state law regarding the statute of limitations should apply, particularly when the government voluntarily entered a contractual transaction which was particularly and painfully tailored to individualized and state law requirements and under which the government agreed to be bound, even though it was not a party to the original contract between Peoples Household Furnishings, Inc., and Bank Of The Commonwealth but received it's interest through assignment in the commercial field.

The instant case is clearly distinguishable from *United States v Summerlin*, 310 U.S. 414; 60 S.Ct. 1019; (1940); *United States v John Hancock et al,* 364 U.S. 301 (1960) and *Board of Jackson County Commrs. v United States* 308 U.S. 343 (1939) as pointed out in *United States v California State Board of Equalization,* 507 U.S. 746; 113 S.Ct. 1784 (1993) in that the United States was a direct party to the transaction in its' own right e.g. in Hancock supra, the U.S. held a mortgage note as junior lienor; in Board of Jackson County Commrs. the United States

held a trust patent in trust for the Indians directly and sued the County for refund of taxes based on its rights as trustee; and even though in *Summerlin,* the case stated that it is "unnecessary to review the series of transactions by which the United States becomes the assignee of a claim," it may be reasonable to assume that the United States had a direct interest similar to the cases to which *Summerlin* has been compared.

WHEREFORE, Appellant request of this Honorable Court to reconsider its decision and find that the United States should be bound by the contractual terms of the private parties in which state law governed and therefore in order to preserve the integrity of contracts as in *Republic* supra, and require in the instant case that the government is bound by state law and its ten year statute of limitation for renewal of judgments.

Respectfully submitted,

TUCKER & HUGHES, P.C.

s/ Clarence B. Tucker
CLARENCE B. TUCKER; (P-40703)
Attorney for Petitioner-Appellant
615 Griswold, Suite 920
Detroit, MI 48226
(313) 961-5270

Dated: *April 5, 1996*

APPENDIX F — COMPLAINT BY THE UNITED STATES IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JULY 7, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL NO 93-2360

HON. AVERN COHN

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

PEOPLES HOUSEHOLD FURNISHINGS, INC., A Michigan Corporation, and EDWARD J. HOLLAND, JR., jointly and severally,

Defendants.

COMPLAINT

Plaintiff United States of America, by its attorneys, Stephen J. Markman, United States Attorney, and Ellen Christensen, Assistant U.S. Attorney, both for the Eastern District of Michigan, for its complaint against Edward J. Holland, Jr., state as follows:

1. Jurisdiction in this matter is established by 28 United States Code, Section 1345, as the United States of America is the complaining party.

2. On February 9, 1978, in the United States District Court for the Eastern District of Michigan, judgment was entered in favor of the United States of America against Edward J. Holland, Jr. in the amount of $435,486.99, plus plaintiff's costs of $125.26. The judgment provided that interest accrue on the principal at a rate allowed by law and was duly filed in the records of the Clerk of this Court under Civil No 4-70881.

3. There is an unpaid balance of $884,174.38 on the above-described judgment ($435,486.99 in principal, $125.26 in costs, and $448,562.13 in accrued interest) as of April 15, 1993. Interest continues to accrue at the rate allowed by law at the time of entry of the judgment.

WHEREFORE, plaintiff prays for judgment against defendant Edward H. Holland, Jr. in the amount of $884,174.38 plus interest at the rate of six per cent until the date of entry of the renewal of judgment, plus costs in the amount of $0, plus post-judgment interest at the legal rate at the time of entry until the debt has been paid in full, plus a ten per cent surcharge as permitted by 28 United States Code, Section 3011 and any other relief deemed appropriate by the Court.

Respectfully submitted,

STEPHEN J. MARKMAN
UNITED STATES ATTORNEY

s/ Ellen Christensen
Ellen Christensen (P28574)
Assistant U.S. Attorney

APPENDIX G — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED FEBRUARY 9, 1978

CIVIL ACTION

NO. 4-70881

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PEOPLES HOUSEHOLD FURNISHINGS, INC., a Michigan corporation, and EDWARD J. HOLLAND, JR., jointly and severally,

Defendants.

JUDGMENT

The matter having come on following the plaintiff's amended motion for entry of judgment and the issues having been considered and decided in a Memorandum Opinion and Order entered in this cause on this date,

IT IS HEREBY ORDERED that plaintiff United States of America recover from defendant Edward J. Holland, Jr., the sum of $435,486.99 with interest thereon at the rate of six per cent per annum plus costs of $125.26. Execution may issue.

s/ Philip Pratt
PHILIP PRATT
United States District Judge

Appendix G

Dated: February 9, 1978

Detroit, Michigan

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JULY 14, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 93-CV-71619-DT

Hon. Nancy G. Edmunds

United States of America,

Plaintiff,

v.

Peoples Household Furnishings, Inc., a Michigan corporation, and Edward J. Holland, Jr., jointly and severally,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION TO DISMISS

This cause comes before the Court on the government's motion for summary judgment and on Defendants' motion to dismiss. The government's complaint, filed on April 19, 1993, seeks to revive a dormant judgment.[1]

---

1. The original judgment was entered on February 9, 1978.

Appendix H

Defendants' motion to dismiss asserts that Plaintiff's action is barred by Michigan's ten year statute of limitations. (Mich. Comp. Laws. Ann. § 600.5809(3)). As explained in Plaintiff's brief in support of summary judgment, however, "the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." Plaintiff's brief at 3, *citing U.S. v. Summerlin,* 310 U.S. 414 (1939). *See also United States v. Middler,* 127 F. Supp. 686, 688-89 (E.D. Mich. 1955); *United States v. Hannon,* 728 F.2d 142, 145 (2d Cir. 1984).

Having reviewed the respective briefs of the parties; and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is hereby GRANTED and defendants' motion to dismiss is hereby DENIED. Judgment is entered in favor of plaintiff United States of America, against Edward J. Holland, Jr., for the sum of $884,174.38 plus interest at the rate of six percent per annum from the date of default to date of judgment; costs; penalty charges; ten percent surcharge per 28 U.S.C. § 3011(a); and interest from date of judgment at the legal rate in effect on such date.

s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: JUL 14 1993

Appendix H

PURSUANT TO RULE 77(d) FRCIVP
COPIES HAVE BEEN MAILED TO:
Stephen Markman
Hallison Young
ON, JUL 14 1993
s/ illegible
DEPUTY COURT CLERK

APPENDIX I — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED JULY 14, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 93-CV-71619-DT

Hon. Nancy G. Edmunds

United States of America,

Plaintiff,

v.

Peoples Household Furnishings, Inc., a Michigan corporation, and Edward J. Holland, Jr., jointly and severally,

Defendant.

JUDGMENT

The Court having reviewed the pleadings in this matter and being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is hereby GRANTED and defendants' motion to dismiss is hereby DENIED. Judgment is entered in favor of plaintiff United States of America, against Edward J. Holland, Jr., for the sum of $884,174.38 plus interest at the rate of six percent per annum from the date of default to date of judgment; costs; penalty charges; ten percent surcharge per 28

Appendix I

U.S.C. § 3011(a); and interest from date of judgment at the legal rate in effect on such date.

SO ORDERED.

s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: JUL 14 1993

APPENDIX J — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED OCTOBER 6, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 93-71619

UNITED STATES OF AMERICA,

Plaintiff,

v.

PEOPLES HOUSEHOLD FURNISHINGS, INC., and EDWARD J. HOLLAND, JR.,

Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

This matter comes before the Court on Defendants' motion for reconsideration of an Order dated July 14, 1993 granting Plaintiff's motion for summary judgment and denying Defendants' motion to dismiss.

Pursuant to Rule 7.1(h) of the Local Rules for the Eastern District of Michigan, a motion for reconsideration should be granted if the movant demonstrates that the court and the parties have been misled by a palpable defect and that a different disposition of the case must result from a correction of such

palpable defect. A motion that merely presents the same issues already ruled upon by the court shall not be granted.

Defendants' motion fails to demonstrate that the Court and the parties were misled by any palpable defect. For the reasons stated in the Court's prior order and the reasons stated in Plaintiff's reply to Defendants' motion for reconsideration, Defendants' motion is hereby DENIED.

s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: OCT 061993

APPENDIX K — MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 93-CV71619DT
Hon. Nancy G. Edmunds

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PEOPLES HOUSEHOLD FURNISHINGS, INC., a Michigan Corporation; EDWARD J. HOLLAND, JR. jointly and severally,

Defendants.

MOTION TO DISMISS COMPLAINT

Now comes Defendant Edward J. Holland, Jr., by and through his undersigned attorney, pursuant to FRCP 12(b)(6), and moves the court to dismiss the action because the complaint fails to state a claim against Edward J. Holland, Jr., upon which relief can be granted because the complaint facially shows that the relief sought therein is barred by the applicable statute of limitations, M.C.L.A. § 600.5809(3), in that:

1) The complaint alleges that the judgment was rendered on 2/9/78, and

2) The applicable period of limitations governing enforcement of the subject judgment is 10 years as provided for in M.C.L.A. §600.509(3), and

Appendix K

3) More than 10 years has elapsed since the judgment was rendered.

Wherefore, Defendant Holland moves that Plaintiff's complaint be dismissed with prejudice against him and that he be awarded his costs and expenses incurred in defending this complaint.

5/10/93

s/ Hallison H. Young
Hallison H. Young (P22642)
P.O. Box 315189
Detroit MI 48231
567-7050

APPENDIX L — EXCERPTS OF PROMISSORY NOTE

NOTE

Detroit, Michigan

(Date) October 23, 1970

$350,000

For value received, PEOPLES HOUSEHOLD FURNISHINGS, INC. (hereinafter called "Undersigned") promises to pay to the order of BANK OF THE COMMONWEALTH (hereinafter called "Holder"), at its banking house in the city of DETROIT, STATE OF MICHIGAN, or at Holder's option, at such other place as may be designated from time to time by the Holder, the sum of THREE-HUNDRED FIFTY-THOUSAND dollars with interest on the unpaid principal computed from the date of each advance to the Undersigned at the rate of 10 3/4 percent per annum payment to be made in installments as follows:

* * *

This note is subject to the terms and conditions of a financing agreement entered into by and between Bank Of The Commonwealth & Peoples Household Furnishings on the 27 day of August, 1970, the terms and conditions of the said "financing agreement" being incorporated herein reference.

s/ Clarence B. Tucker
Peoples Household Furnishings, Inc.

Secretary
TITLE

* * *

APPENDIX M — ASSIGNMENT OF NOTE

FOR VALUE RECEIVED, the Undersigned hereby sells, assigns and transfers without recourse to SMALL BUSINESS ADMINISTRATION, an Agency of the United States of America, all of the Undersigned's right,title and interest in and to that certain Promissory Note dated October 23, 1970, and any and all amendments thereto, in the original sum of THREE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($350,000.00), made by Peoples Household Furnishings, Inc., to the order of the Undersigned, to which Note this Assignment is appended and made a part thereof.

BANK OF THE COMMONWEALTH
Detroit, Michigan

By: s/ [illegible]

Attest: s/ [illegible]

Dated: _____

At: Detroit, Michigan

Supreme Court, U.S.
FILED
OCT 1 1996
CLERK

No. 96-172

In the Supreme Court of the United States

OCTOBER TERM, 1995

EDWARD J. HOLLAND, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ANTHONY J. STEINMEYER
MARC RICHMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Michigan's 10-year statute of limitations on the enforcement of judgments applies to limit a suit brought by the United States to enforce a judgment that arose from the actions of a federal agency taken in a governmental capacity.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-172

EDWARD J. HOLLAND, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-18a) is reported at 75 F.3d 252. The opinion of the district court (Pet. App. 31a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1996. A petition for rehearing was denied on May 2, 1996. Pet. App. 5a-6a. The petition for a writ of certiorari was filed on July 31, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This suit was brought by the United States to enforce a judgment obtained against petitioner in 1978. That judgment is based on an obligation incurred by petitioner in connection with a federal loan guaranty program administered by the Small Business Administration (SBA), a federal agency established by Section 204 of the Small Business Act of 1953, Pub. L. No. 163, 67 Stat. 233, 15 U.S.C. 633. This program is designed to promote the training and hiring of members of racial minorities. Peoples Household Furnishing, Inc. (Peoples), a minority-owned company, borrowed $350,000 from a local bank under that program. The SBA guaranteed 90% of the loan. Petitioner, who was the president of Peoples, personally guaranteed the loan. Pet. App. 8a-9a.

Peoples was the successor of a Detroit-area retailer that had been forced into reorganization under Chapter XI of the Bankruptcy Act. Although Peoples' loan application failed to meet the SBA guidelines for loan approval, it was approved by the SBA's District Director, "who felt that the social welfare advantages of the proposal, in providing 'a sympathetic training environment for persons in minority groups,' outweighed the adverse factors which normally would justify rejection of such a loan." Pet. App. 9a n.1. The District Director required petitioner's personal guarantee of the loan as a condition of its approval. *Ibid.*

A promissory note entered into between Peoples and the bank in 1970 memorialized the loan. The underlying financing agreement provided that the laws of Michigan were to govern. Peoples thereafter defaulted on the note and, in 1971, the bank assigned

the note to the SBA. The SBA subsequently demanded payment in full from Peoples and petitioner. After the demand was not met, the corporation's assets were liquidated at a public sale. The proceeds were credited against the balance owing. Pet. App. 9a-10a.

In December 1973, the United States filed suit for the deficiency against Peoples and petitioner in federal district court. Peoples received a discharge in bankruptcy before the case went to judgment. In February 1978, the district court entered judgment against petitioner on his personal guaranty. The judgment, which included accrued interest, was for $435,487 plus costs and six percent interest from January 18, 1978. Pet. App. 10a.[1]

2. In April 1993, the United States filed suit against petitioner in federal district court to collect the unpaid balance of $884,174 on the 1978 judgment. The complaint sought judgment in that amount, plus interest and a ten percent surcharge pursuant to 28 U.S.C. 3011. Petitioner moved to dismiss the complaint under Mich. Comp. Laws Ann. § 600.5809(3) (West 1987), which provides that "the period of limitations is 10 years for actions founded upon judgments or decrees rendered in a court of record of this state, or in a court of record of the United States * * * from the time of the rendition of the judgment." Pet. App. 10a-11a. The district court denied the motion and granted summary judgment for the government. The court noted that, under the well-established rule

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[1] The government asserted that it made several unsuccessful efforts to collect this judgment. Petitioner claimed that the government made no such efforts. This factual dispute was not resolved by the district court. Pet. App. 10a.

of *United States* v. *Summerlin*, 310 U.S. 414 (1940), the United States is not subject to state statutes of limitations with respect to claims acquired and asserted in a governmental capacity. Pet. App. 32a. The court of appeals affirmed on that same basis. *Id.* at 14a-16a.[2]

ARGUMENT

The decision of the court of appeals correctly applies well-settled precedents of this Court and conflicts with no decision of any other court of appeals. Further review is therefore not warranted.

1. The United States is not bound by state statutes of limitations with respect to claims acquired and asserted by the United States in its governmental capacity. *United States* v. *Summerlin*, 310 U.S. 414, 417 (1940). Speaking for a unanimous court in *Summerlin*, Chief Justice Hughes observed that it is "well settled that the United States is not bound by state statutes of limitation * * * in enforcing its rights." *Id.* at 416. A state statute would "transgress[ ] the limits of state power" if applied to limit the claims of the United States. *Id.* at 417. The

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[2] The judgment was for "the sum of $884,174.38 plus interest at the rate of six percent per annum from the date of default to the date of judgment; costs; penalty charges; ten percent surcharge per 28 U.S.C. § 3011(a); and interest from date of judgment at the legal rate in effect on such date." Pet. App. 11a n.3. According to the complaint, the $884,174.38 figure already included interest to April 15, 1993. The court of appeals did not understand why the government should be entitled to additional interest on that figure "from the date of default," and it questioned the penalty charges and surcharge as well. Although petitioner had not raised this issue on appeal, the court stated that it did "not intend to preclude him from doing so in the district court." *Ibid.*

Court explained that, "[w]hen the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." *Ibid.*, citing *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 126, 127 (1919).

In applying *Summerlin*, the court below correctly held (Pet. App. 14a-16a) that the United States' suit on the judgment was an action taken in a governmental, rather than in an individual or proprietary, capacity. As in *Summerlin*, a federal statute authorized the government to become the assignee of the note on which it brought suit in this case. The court found that "[t]he statute in question was designed to enhance the security and economic well-being of the nation, see 15 U.S.C. §631, and its purposes are surely no less 'governmental' in character than those of the National Housing Act at issue [in *Summerlin*]." *Id.* at 14a-15a.

The court of appeals concluded that the SBA decision to approve the Peoples loan was based entirely on the "social welfare advantages" of the loan. Pet. App. 15a. As the court explained, the agency's motivation "had a quintessentially governmental cast to it. The approval of the loan, like the taking of the assignment when the loan went sour, was unquestionably governmental, in our view, and not proprietary." *Ibid.*

The United States also acted in a governmental capacity when it reduced its claim to judgment and then later brought suit on the judgment. The Small Business Act authorizes the agency to "pursue to final collection * * * all claims against third parties

assigned to the Administrator in connection with loans made by him." 15 U.S.C. 634(b)(4). The suit to enforce the judgment against petitioner falls precisely within this statutory authority. The court thus correctly concluded that the United States was acting in a governmental or sovereign capacity in this case.

2. Although the court of appeals correctly concluded that well-settled precedent compelled its decision, the court questioned the wisdom of those precedents. Pet. App. 16a-18a. In so doing, the court noted that, in *Farmers Home Admin.* v. *Muirhead*, 42 F.3d 964, cert. denied, 116 S. Ct. 50 (1995), the Fifth Circuit had stated in dictum:

> [T]he ancient attribute of sovereignty asserted by the federal government is far more appropriate to essential sovereign functions than to the federal government's role as a lender to veterans, small business owners, farmers, and disaster victims among others. That the attribute is ancient does not make it sensibly applicable to the government's role in commercial transactions. * * * In short, *Summerlin* and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's real property foreclosure actions arising from federal loan programs.

42 F.3d at 967-968. Although, like the court in the present case, the *Muirhead* court questioned the logical basis of "*Summerlin* and related cases" (*id.* at 968), the Fifth Circuit nonetheless properly applied those decisions to hold the state statute of limitations

inapplicable to the federal agency's action to enforce its lien. *Id.* at 967.[3]

In the present case, the court of appeals did not think "it really justifiable, in today's world, that judgments obtained on loans made or guaranteed under these programs should be subject to resuscitation 15 or 30 or 60 years after entry, regardless of state law to the contrary." Pet. App. 17a. But that very question was addressed and resolved to the contrary by this Court in *Summerlin*. Moreover, in particular contexts in which interests of third parties may be affected, Congress has fixed by statute a period of limitation for governmental claims. See, *e.g.*, 28 U.S.C. 3201(c) (limiting judgment liens on a judgment debtor's real property to 20 years, once renewable); 26 U.S.C. 6322, 6502(a)(1) (providing generally that a tax lien becomes unenforceable ten years after assessment of the tax). Having selected a period of repose for judgment liens on real property only in 28 U.S.C. 3201(c), Congress must be presumed, in light of *Summerlin*, to have intended *not* to limit enforcement of

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[3] The facts in the present case are clearly distinguishable from those presented in *Muirhead*. *Muirhead* involved the effect of state statutes of limitations on the government's real property foreclosure actions. The court was concerned that the absence of any statute of limitations for such proceedings initiated by the government would disrupt commerce in real property because the existence of ancient mortgages would threaten to cloud titles. 42 F.3d at 965, 967-968. The instant case does not involve titles to real property over which more than one party may have a claim. Rather, this case involves a judgment of a United States District Court that petitioner flouted by refusing to pay. Petitioner could not rationalize to himself that perhaps the claim against him was invalid; he knew for certain that he owed the United States the amount of the judgment.

judgment liens by the United States against other forms of debtor property.[4] There is no conflict or other reason to warrant further review of this settled rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] None of the cases on which petitioner seeks to rely (Pet. 7-10, citing *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), *United States* v. *Yazell*, 382 U.S. 341 (1966), and *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994)), involved a statute of limitations on a claim of the United States.